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No. 857

In the Supreme Court of the United States

OCTOBER TERM, 1964

SENECA NATION OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is reported at 338 F. 2d 55. The unreported opinion of the district court appears at Pet. App. 8a–11a.

JURISDICTION

The judgment below was entered on October 29, 1964 (Pet. App. 1a). The petition for a writ of certiorari was filed January 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Army, in condemning lands of the Seneca Indian Nation to replace a two-

lane State highway rendered unusable by a federal reservoir project, exceeded his statutory authority when he condemned, not merely such land as was necessary to duplicate the existing two-lane highway, but also an additional 50 acres needed to permit the future construction of a four-lane limited access highway in response to projected traffic requirements.

STATEMENT

On October 11, 1963, the United States, in connection with the Allegheny Reservoir Project (Kinzua Dam), condemned easements over two tracts of land within the Allegheny Indian Reservation for the relocation of a part of Route 17, a State highway which presently runs through lands in the reservation. The relocation is necessary because, as presently situated, Route 17 would interfere with the operation of the project.

The relocated portion of the road on the reservation will ultimately be a four-lane controlled access highway in keeping with the connecting State highway system, and an easement of sufficient width has been taken to accomplish that purpose.

Petitioner denied the government's authority to take lands in excess of those necessary to duplicate the existing two-lane roadway. The district court granted judgment in favor of the United States on January 17, 1964. The court of appeals affirmed (Pet. App. 2a–3a).

ARGUMENT

There is no dispute as to the authority of the United States, acting through the Secretary of the Army, to

condemn land within the reservation for the Allegheny Reservoir Project. *Seneca Nation of Indians* v. *Brucker,* 262 F. 2d 27 (C.A. D.C.), certiorari denied, 360 U.S. 909. Petitioner further concedes, moreover, that the replacement or relocation of existing highways is an appropriate project purpose (Act of June 28, 1938, 52 Stat. 1215, as amended, 33 U.S.C. 701c–1), and it does not challenge the government's right to take enough land for a two-lane road easement to replace or relocate State Route No. 17 (Pet. 11–12). The narrow question presented, therefore, is whether the Secretary exceeded his statutory authority in condemning, not merely such land as was necessary to duplicate the existing two-lane highway, but also an additional 50 acres needed to permit future expansion of Route 17 into a four-lane limited access highway. We submit that the courts below were correct in concluding that the Secretary's action was a reasonable exercise of delegated administrative discretion and should not be disturbed.

As the district court pointed out, the contemplated widening of the highway, "necessary in light of traffic forecasts, is probable in terms of present state planning. Moreover, the projected highway requirements, it appears, are affected in part by the Allegheny Reservoir Project itself. These factors and also substantial cost savings which would result from a single acquisition and highway design to accommodate the future improvement, apparently have prompted the additional taking." (Pet. App. 9a). It was entirely proper, we submit, for the Secretary to give weight to such considerations. As a result of the Allegheny

Reservoir Project, he was faced with the necessity of purchasing land for the construction of a new highway. In so doing, the Secretary was not constrained merely to duplicate the existing and soon-to-be outmoded State highway—a highway constructed to meet the traffic problems of an earlier day—but was free to acquire an easement which would make it possible to accommodate the projected traffic requirements of the readily foreseeable future. The question of the necessity and expediency of the taking is essentially a legislative question to be resolved, not by the courts, but by Congress and the executive agency (here the Secretary of the Army) to which it has delegated the power to condemn. See, *e.g.*, *Shoemaker* v. *United States*, 147 U.S. 282; *Berman* v. *Parker*, 348 U.S. 26.

Petitioner argues (Pet. 10–14), however, that where Indian lands are involved, Congress must authorize specifically the precise details of the condemnation, rather than exercise its traditional power to delegate this function. Such a limitation on Congress' authority would seriously impede the prompt execution of public projects and has no support in the case law. Indeed, the very cases cited by petitioner clearly refute the notion that Congress must expressly authorize by "special enactment" each particular taking of Indian land; for, both in *Seneca Nation of Indians* v. *Brucker*, *supra*, and in *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885 (C.A. 2), certiorari denied, 358 U.S. 841, the courts of appeals upheld the power of the government to acquire Indian lands in connection with public projects despite the absence of

any express statutory recognition that Indian lands would be among those affected by the project.

The decision below is not in conflict with that of any other circuit.[1] Since it is conceded that condemnation of land within this reservation was authorized, none of the cases cited (Pet. 14–15) with respect to the force and effect of Indian treaties is relevant. There is no occasion for further review.

CONCLUSION

For the reasons stated, we respectfully submit that the petition should be denied.

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Solicitor General.
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Attorneys.

FEBRUARY 1965.

[1] Insofar as *United States* v. *2005.32 Acres of Land, Etc.*, 160 F. Supp. 193 (D.S. Dak.), is to the contrary, we think it erroneous. The matter was settled during the pendency of the appeal and the appeal dismissed as moot. *United States* v. *Sioux Indians of Standing Rock Reservation*, 259 F. 2d 271 (C.A. 8).

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